UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Agnes M. Guard, individually and as personal representative of the Estate of George Guard, Charging Party, and Agnes M. Guard, Intervenor, v. Ocean Sands, Inc., Respondent.	HUDALJ 04-90-0231-1 Decided: September 3, 1993

Theresa L. Kitay, Esq.
For the Charging Party

George R. McLain, Esq.
For the Intervenor

James R. DeFurio, Esq.
For the Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This matter arose as a result of a complaint filed on February 20, 1990, by George and Agnes Guard (collectively the "Guards"), a married couple, with the U.S. Department of

Housing and Urban Development ("HUD" or the "Charging Party") alleging violations of the Fair Housing Act ("Act") based on the handicap of George Guard. 42 U.S.C. §§ 3601-3619. The Guards alleged that the Respondent Ocean Sands, Inc. ("Association")[1] had denied their requests for reasonable accommodations and permission to make reasonable modifications to their condominium unit made necessary because of George Guard's mobility impairment.

After an investigation, HUD issued a Determination of Reasonable Cause and Charge of Discrimination ("Charge") on February 3, 1993.[2] Agnes Guard was permitted to intervene in her individual capacity and was represented by counsel.

A hearing in this matter was held in Bradenton, Florida, on May 10-12, 1993.[3] At the close of the hearing the parties were instructed to file post hearing briefs by July 8, 1993, and briefs were filed by all parties.

Based upon the entire record, including my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following findings.

Findings of Fact

The Guards had lived in New Jersey and took vacations on the Gulf Coast of Florida. (Tr. 240).[4] In 1980 the Guards bought unit #4 at Ocean Sands in Venice. Ocean Sands fronts on the Gulf of Mexico. When George Guard retired, the Guards left New Jersey and moved into their condominium unit at Ocean Sands. (Tr. 240). The Guards both had been golfers, but because of George Guard's severe arthritis and macular degeneration that reduced his vision, he could no longer play golf. (Tr. 240-241). The Guards chose, therefore, to purchase a residence on the Gulf, rather than on a golf course, so the Guards, especially George, could enjoy the Gulf, which he loved. (Tr. 241). George Guard, an avid reader, enjoyed sitting by the Gulf as he read. (Tr. 241).

Ocean Sands is a small, ten unit, condominium. (R. 24). It is bordered on the west by the

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[1]The premises of the condominium will be referred to as "Ocean Sands".

[2]Between the filing of the complaint and the issuance of the Charge, George Guard passed away. The Charge was issued on behalf of Agnes Guard both individually and as the representative of the Estate of George Guard.

[3]The hearing included a view of the premises of Ocean Sands on May 10, 1993, with counsel for all parties present.

[4]The following abbreviations are used in this decision: "Tr." for Transcript followed by page numbers; "C" for Court's exhibits followed by the exhibit number and, where appropriate, page numbers; "G" for the Charging Party's exhibits followed by the exhibit number and, where appropriate, the page numbers; and "R" for Respondent's exhibits followed by the exhibit number and, where appropriate, the page numbers.

Gulf of Mexico, on the east by a loose pebble parking lot leading to Golden Beach Boulevard, and on the north and south by loose pebble driveways. (R. 24; G. 20; G. 21). The three buildings of the condominium form a "U" opening on the Gulf, with landscaped grounds and a pool and deck in the center. (G. 21; R. 24). The sides of the "U" are one story villas, and the bottom is a three story apartment building which includes the Guards' unit, as well as other units. (R. 24; G.21). Owners of the units in Ocean Sands pay monthly condominium fees for the maintenance of these grounds and the pool. (Tr. 313; 355).

Ocean Sands is governed by the Association which elects a board of directors ("Board") each year. (R. 24). All unit owners are members of the Association and owners and residents are subject to the Declaration of Condominium and certain rules and regulations. (R. 24; R. 32).

When they moved to Ocean Sands, the Guards entered into a regular routine. George Guard would go to a fitness center while Agnes Guard rode her bicycle. They would then meet and would often spend a portion of the afternoon sitting by the Ocean Sands' swimming pool, enjoying the grounds or walking along the beach on the Gulf.
(Tr. 243-244).

The Guards had friendly relationships with their neighbors, and George Guard socialized and enjoyed talking to people. The Guards were a social couple and hosted their Ocean Sands neighbors on a number of special occasions. (Tr. 244-246). Because they were among the few full time residents of Ocean Sands, the Guards took an interest in the operation of the condominium. Agnes Guard served on the Board, and would generally watch the apartments of neighbors who were often absent.
(Tr. 244-245; 317-318; 497).

In 1985 George Guard fell in the bathtub and suffered a stroke which paralyzed his left side. He was never able to walk independently again. Mr. Guard spent many months in the hospital and in a head trauma facility. (Tr. 235; 252). Initially he improved through therapy, and his doctors were hopeful he might walk again. (Tr. 251). In 1986, a therapist left Mr. Guard unattended for a short time, and he fell, breaking his hip and wrist. (Tr. 235). After this incident he had very little mobility and was virtually confined to a wheelchair. (Tr. 235). There was some improvement from the 1986 incident until 1990, when he started regressing. (Tr. 238). He kept failing and having mini strokes. (Tr. 237).

The front of the Guards' unit is at ground level with a short walkway to the paved parking area that ends at a loose pebble lot leading to Golden Beach Boulevard.
(G. 21). Agnes Guard was able to push her husband's wheel chair on the paved parking area to their car. (G. 23). It was a very difficult struggle for Agnes Guard to lift her husband into the front passenger seat of the car and then store the wheelchair. (Tr. 250-251). It was not practically possible for Agnes Guard and a nurse to push George Guard in his wheelchair beyond the paved parking area across the loose pebble lot to Golden Beach Boulevard. (Tr. 254-255; 422).

The Guards' patio in the back of the unit, facing the Gulf and the pool, is about three feet above the ground level. (G. 21-5; G. 21-6; Tr. 197). A common breezeway through the building ends in a narrow stairway of four steps down to ground level. (G. 21-2; G. 23-3; G. 23-4). The Guards' apartment has no ground level access to the back and, because of the loose pebble driveways surrounding Ocean Sands, there was no way to get George Guard and his wheelchair from the front of the building to the grounds in the back. (Tr. 256).

In 1985, on the day she left her husband at the trauma facility, Agnes Guard was approached by the then president of the Association, Dr. Glen Mohney, who asked her why the Guards did not leave Ocean Sands. He stated that "we" do not want this as a convalescent home. (Tr. 247-248).

At some time, while George Guard was still able to use a walker, a wooden walkway to the pool was installed to permit him, using his walker, to go to the pool. (G. 40, p. 50). There is no evidence in the record to establish that this walkway was installed at the request of the Guards.

Because of George Guard's severely impaired mobility the Guards attempted to make Ocean Sands wheelchair accessible. In part of their proxy addressed to the Association, dated March 26, 1987, the Guards requested that the annual meeting of the Association to be held on March 27, 1987, discuss the Guards' requests that a walkway to Golden Beach Boulevard be installed together with a ramp to enable a wheelchair to get down the steps to the common areas. The Guards also asked permission to have and park a wheelchair van.[5] The proxy letter stated that the Guards were advised by then Association president Polly Leake[6] that a substantial number of Ocean Sands unit owners objected to the Guards' requests. (G. 24). The Guards' requests were discussed at the March 27, 1987, meeting. (Tr. 471). The Guards' proxy, Gerald Vercaemert, reported back that he got the impression that the Guards' requests would be looked upon favorably if the Guards put their requests in writing. (Tr. 471; G. 24).

In a letter dated July 13, 1987, the Association's attorney, Chad M. McClenathen, advised the Guards that their request to make alterations to the condominium property to allow wheelchair access to the pool, common areas, and Golden Beach Boulevard, and the request to park a van equipped to accommodate handicapped persons at Ocean Sands were denied. (G. 1). McClenathen's letter stated further,

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[5]Permission was required because the Association's Rules and Regulations and Declaration of Condominium prohibit the permanent parking of recreational vehicles, vans, motor homes, etc. on the premises. (Tr. 260; R. 24; R. 32; G. 1).

[6]Leake, while president of the Association, told Agnes Guard that Leake had contacted some of the owners and they did not want it to be a convalescent home. (Tr. 248).

> "...If the resolution is not satisfactory you should bear in mind that the Association operates for the benefit of the community as a whole and not for any individual owner. If this is not acceptable to you, condominium living may not be the mode of living most convenient for you and you may wish to alter your future plans accordingly." (G. 1).

By letter dated March 30, 1989, subsequent to the amendment of the Fair Housing Act in 1988, effective in 1989, the Guards wrote to the Board referring to the amendments to the Act and demanded that the Association construct and maintain a suitable ramp and path by which George Guard could have access to the pool, beach walk, and Golden Beach Boulevard. They also requested permission to park a handicap van in their assigned parking space. (G. 25).

By letter dated April 5, 1989, McClenathen, on behalf of the Association, responded to the Guards' March 30, 1989 letter. McClenathen stated that the Board recognized that it must approve the Guards' request for permission to park a specially equipped motor vehicle in their parking space. McClenathen instructed the Guards to advise the Board of the make, year, and description of the vehicle "...so the Board may, if necessary, examine the vehicle to verify it is in fact specially equipped to transport a handicapped person." The letter went on to state that the Act did not require the Association to construct ramps or other means of access for George Guard and thus the Board was rejecting the Guards' demand that the Association, at its expense, construct the ramps and other facilities. McClenathen's letter informed the Guards that if they wished to undertake their own modifications, "...it would be necessary to submit two sets of detailed plans and specifications setting forth the scope of the work to be performed." The letter concluded by suggesting that if the Guards still felt the Act required the Association to install the improvements to the facilities at its expense, the Guards should hire an attorney. (G. 2).

The Guards interpreted this April 5, 1989 letter as being only conditional approval for use of the van and that the approval would be withdrawn if the van did not meet with the Board's approval, after inspection. (Tr. 277).

Agnes Guard contends that shortly after receiving the April 5, 1989 letter from McClenathen, she was visited at her home by Marjory Barksdale, then president of the Board. Agnes Guard contends that Barksdale had a copy of the April 5, 1989 letter and stated that they were allowing the Guards to have the van with certain restrictions. The Board would have to make sure the van was for a handicapped person and it was permitted for the use of George Guard because he was the handicapped person. Barksdale allegedly continued to state that the van was not to be used as a recreational vehicle and it was not to be used for "fishing, picnics or any recreational purposes."
(Tr. 279).

Barksdale testified that she had no recollection of participating in any such conversation and can think of no reason she would have said these things to Agnes Guard. (Tr. 521-523).

I find that Barksdale did not make the statements attributed to her by Agnes Guard. In so concluding I credit the testimony of Barksdale. I found her to be a truthful and credible witness. When testifying about the use of a handicap van, Agnes Guard was very emotional and was less credible. Neither Agnes Guard nor her attorney, Daniel Lobeck, mentioned that the Association's approval of the use of the van was too restrictive or limited until almost a year later when, at an Association annual meeting of March 30, 1990, after the Complaint herein had been filed, Lobeck stated that the Association had restricted the use of the van by not allowing it to be used for fishing. (Tr. 165-166; G. 15, p 15). I find this delay in referring to the alleged limitation on the use of the van inconsistent with expected behavior. After the April 5, 1989 letter, the van is not mentioned again in any of the extensive correspondence from Lobeck to McClenathen. Further, a disinterested witness, Edward Lovett, testified that in early 1991 he witnessed Agnes Guard inspecting a handicap van in the parking lot of Ocean Sands. Lovett observed Agnes Guard and George Guard test the van by driving it and using the wheelchair accommodation. Lovett was to talk to Agnes Guard about doing work on her car. (Tr. 508-511). Again, Agnes Guard denies these events occurred.
(Tr. 563). I credit Lovett, a witness with no interest in the outcome of this case, as to this event involving a van and, again, I do not credit Agnes Guard. Accordingly, in light of all the foregoing, I find Barksdale's testimony concerning use of the handicap van was more credible, reliable, and consistent with surrounding circumstances than was Agnes Guard's.

After receiving McClenathen's April 5, 1989, letter, the Guards retained Lobeck, an attorney, to represent them. (Tr. 282). They also hired Ted Yeatts, a licensed civil engineer, to draw up construction plans for modifications Agnes Guard desired.
(Tr. 176-177; G. 18).

Yeatts prepared such plans after making several field inspections of Ocean Sands. These plans were drawn on top of schematic drawings of Ocean Sands that Agnes Guard had provided Yeatts. (Tr. 177-178, 187; G. 20). In the front of Ocean Sands Yeatts' plans provided, with specifications, a wooden plank walkway starting at the paved parking area and crossing the loose pebble lot, level with the pebble surface, to Golden

Beach Boulevard. (Tr. 180; G. 20). This would permit George Guard to be wheeled, in his wheelchair, to Golden Beach Boulevard.

The plans, utilizing a brochure describing "Wheel-O-Vator" porch lifts, which Agnes Guard had provided Yeatts, located a lift on the ground just outside the Guards' patio, behind a protruding wall. The lift gave access from the Guards' patio to the ground. These plans called for a rain awning over the lift, a minor relocation of plantings next to the Guards' unit, and the installation of an electrical line, according to city and national codes, running from the lift to an inside control box. (Tr. 182, 184-185; G. 20). The plans also provided for a plank walkway that would lead from the lift to an existing walkway that leads to the pool. (Tr. 182; G. 20). Yeatts billed Agnes Guard $500 and provided the names of several contractors who could do this work for the Guards. (G. 22).

In a letter dated July 28, 1989, to McClenathen, Lobeck enclosed Yeatts' plans and the wheelchair lift brochure. (G. 3; G. 19; G. 20). The brochure identified three models, two of which are wheelchair lifts. The two models of wheelchair lifts each came in seven different submodels distinguishable only by the lift and "shroud" heights.
(G. 19). There was also a model of a stair lift which just moved a person, not a wheelchair. The letter stated that, at their expense, the Guards desired to modify the condominium common elements to provide handicap access from their unit to the pool area. Lobeck stated that the handicap access plan was reasonable, and that the Guards' requested expedited consideration of the request. (G. 3). There was no mention or description of a ramp over the back stairs.

Lobeck again wrote to McClenathen by letter dated August 11, 1989. (G. 4). In this letter Lobeck stated that the Guards are willing to withdraw the request for a wooden walkway over the parking lot if the Association approved the other work, including the wheelchair lift. Lobeck stated, in reference to a prior inquiry regarding which model of wheelchair lift would be installed, that the determination had not yet been made, and that the inquiry was not relevant as none of the models should be objectionable to the Association. Lobeck stated that the Guards rejected McClenathen's suggestion that a ramp might be an acceptable alternative to the wheelchair lift, because such a ramp would be too steep. The Guards also rejected the suggestion that Association approval be contingent upon the Guards signing a form regarding maintenance and liability. They noted that the Association had not required such a form from other unit owners who had made alterations, nor was such a form required. The Guards, by this letter, also rejected any suggestion that the plans they submitted were insufficiently detailed. (G. 4). Lobeck stated that the Guards offered, as an alternative to the wheelchair lift, a shed on the common elements for storage of a golf cart to transport George Guard. The letter asked that if the Association approved, it should advise of the location the Association would prefer, so the Guards could submit a formal request. The letter stated that if the Association did not approve the alternative, the request for approval of the wheelchair lift stood as submitted. The letter concluded by advising McClenathen that if the Association did not cooperate, the Guards were prepared to exercise their rights under the Act. (G. 4).

The proposal for the golf cart was made because Agnes Guard felt it was a simple solution to the problem of getting George Guard onto Ocean Sands' common property. (Tr. 286).

By letter dated August 25, 1989, to Lobeck, McClenathen stated that, with respect to storage of a golf cart on the premises, a majority of the Board expressed their support, and he suggested two locations that might be acceptable: one on the North side of the Guard unit, and the other the fenced-in area of the condominium property used for storage. McClenathen stated that if the Guards were interested in pursuing the golf cart proposal, they should submit a formal request and clearly indicate whether this request supersedes the prior request for the installation of the electric wheelchair lift and the other improvements. (G. 6). Further, the letter stated that the request for storage of the golf cart should address, "at a minimum," the following:

> "1. Size of the golf cart.

> 2. Propulsion system of the golf cart.
> 3. If electric, as assumed, the arrangements to be made for charging the battery. Electricity will have to be provided by Mr. and Mrs. Guard at their expense.
> 4. Size, building materials, and color of the proposed shed, together with comments concerning its location per the above.
> 5. Responsibility to maintain the shed.
> 6. Time frame in which the installation will take place.
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> The [Association] is not in a position to grant an open-ended approval for installations on the common elements since circumstances may change in the future dictating a change in the location of the shed and otherwise affecting the Board's decision to grant the approval. Accordingly, unlike their prior request to obtain a van which may be accomplished when they choose, the proposed installation of a golf cart and shed, and the electric lift and related improvements, cannot be open-ended and a time frame should be provided for either proposal to be pursued."

(G. 6). The letter further stated that the application for installation of the electric lift and other improvements was to be held in abeyance pending response to the letter. (G. 6).

After receiving a copy of the August 25, 1989 letter, Agnes Guard again talked to Yeatts about the shed, and she learned that the shed would be costly and might take some substantial time because the construction, which would be seaward of the coastal setback line, would require state and local permits. (Tr. 206, 214-215, 288). Agnes Guard also feared that the Association approval process would also take time. (Tr. 288-289). The goal of the Guards was to get immediate access to the grounds so that George Guard, who was failing, could enjoy the condominium area in the time he had left. (Tr. 285, 288-289).

In order to avoid undue delay, Agnes Guard had Lobeck inform McClenathen, by letter dated September 28, 1989, that, "for the time being," she would forego the shed and would, instead, "cover the cart with an appropriate tarpaulin or other suitable material, to protect it from the elements." (G. 7). The letter also stated that the Guards intended to park the golf cart on or near the northwest corner of the patio, next to the kitchen so it would be near an electrical outlet for recharging. (G. 7). The letter also stated that the Guards had determined to place in abeyance, their request for installation of the wheelchair lift and walkways. (G. 7).

The Board met on October 19, 1989, considered the Guards' request for a golf cart covered by an appropriate tarpaulin or other suitable material, and refused this request on the grounds that the cart would present an unsightly view to other owners. The Board, in the minutes of the meeting, also indicates that it felt that, because it had supported the construction

of the shed behind a fence, it could not agree to the current request for safety reasons and the problem of vandalism. (G. 8). By letter dated November 8, 1989, McClenathen transmitted the minutes of the Board's October 19, 1989, meeting to Lobeck.

The Guards were frustrated and angry by this denial, which they felt prevented George Guard from having a better quality of life. (Tr. 289-290). Because Agnes Guard still wanted George Guard to have access to the outside, they renewed their requests for the wheelchair lift and walkways by a letter dated November 27, 1989, from Lobeck to McClenathen. (G. 10).

McClenathen replied to Lobeck by a letter dated December 19, 1989. (G. 11). McClenathen stated that it was anticipated that the location of the golf cart was acceptable, but covering the cart with a tarpaulin was not acceptable. The letter stated that the Board requested that the golf cart be stored in an acceptable shed, and that its specifications, including building materials, size, shape, and color, should be submitted to the Board. The letter went on to say that shed would insure minimal effect on the exterior appearance of the community and would also alleviate safety hazards "associated with the unprotected storage of a golf cart and related electrical apparatus." (G. 11). With respect to the renewal of the request for the wheelchair lift and walkways, McClenathen stated, with respect to the requested walkways from the Guards' unit to the swimming pool, that the Association was not in a position to approve or deny the request until it could determine if there were underground cables, pipes, lines, etc. He stated that, depending on the location of these items, it may become necessary to move the proposed location of the walkway. McClenathen stated that he had been informed that the Guards had in their possession the "as-built" drawings of the community as delivered by the developer. McClenathen demanded that these drawings be delivered to a Board member, since they should be part of the official records. The Board, upon receipt of these drawings, would evaluate the proposal for the installation of the walkway. (G. 11).

By letter dated February 2, 1990, Lobeck advised McClenathen that the Guards did not have "as built" plans, but offered the Association the opportunity to copy whatever plans and specifications the Guards did have. Lobeck also stated that he thought the Association was engaging in delaying tactics. (G. 12).

On February 20, 1990, the Guards filed the Complaint in this matter.

By letter dated March 15, 1990 (G. 14), McClenathen advised Lobeck that the van was a non-issue because Agnes Guard had received permission, by letter dated April 5, 1989, to purchase a specially equipped motor vehicle. (G. 2; G. 14). With respect to the golf cart, McClenathen stated that it was the Guards who first proposed the shed. When asked for specific information about the golf car and the method of storage, the Guards merely provided the "general location" for storing the cart, and stated that it would be covered by a tarpaulin. McClenathen stated this was not sufficient to permit the Association to make a decision. (G. 14). McClenathen stated that the Board had contacted several companies that sell and service golf carts, and he set forth their purported comments as follows:

"1. Golf carts are a prime target for vandalism and theft, especially by teenagers. Therefore, it is recommended they be kept in a secure location.
2. A shed or other structure is best to protect them from the elements. If a shed is used it must be well ventilated with a fan to move the air at least five miles per hour.
3. A twenty-five amp circuit breaker must be provided for the charger.
4. Hydrogen gas will be a problem unless the area is well ventilated during charging.
5. A defective battery and/or charger could cause a fire and only UL approved items be used." (G. 14).

In his letter, McClenathen again requested the following information concerning the Guards' desire for a golf cart to be used and stored at Ocean Sands:

"1. Size, model and manufacture of the golf cart.
2. Propulsion system of the golf cart.
3. If electric, as assumed, the arrangements to be made for charging the battery. These arrangements would necessarily include descriptive items concerning the electrical service which will be provided, the method of dealing with hydrogen gas emitted as a part of the charging process and efforts to protect the system from the elements.
4. Size, building materials and color of the proposed shed, together with comments concerning its exact location. If you continue to insist a tarpaulin will be acceptable, please provide specifics concerning the size and material composition of the tarpaulin and how it will be secured to minimize theft or vandalism, minimize disruption during normal storm activity, etc.
5. Clarify maintenance responsibility for the golf cart, charging components, tarpaulin, and all other components anticipated to be used. Depending upon the items proposed to be used, the Board will notify your client whether an agreement concerning continued maintenance will be a prerequisite to approval.
6. The time frame in which the installation will take place. The Board is not in a position to grant an open-ended approval for installation on the common elements since circumstances may change in the future dictating a change in the location of the golf cart, storage shed, or otherwise affecting the Board's decision to grant approval. Accordingly, a time frame must be provided for any proposal. If the time frame is not met, a new application

> will necessarily need to be submitted for review by the Board upon its merits when received." (G. 14).

On March 30, 1990, the Association held its annual meeting in an apartment at Ocean Sands. The Board had scheduled a discussion of the Guards' requests. Agnes Guard and Lobeck attended this meeting. (G. 15). Nine of the ten unit owners were represented. (G. 15).[7] The meeting was relatively unruly and involved a lot of shouting, etc. (G. 27; R. 33). During the discussion of "New Business", Barksdale, still Association President, stated that the attitude of the Guards during the past year had been a slap in the face. (G. 15, p. 11). Barksdale also said that she did not know what had happened to the van, for which the Guards had received permission, but which never materialized. (G. 15, p. 11). Agnes Guard asked that she and her husband be relieved of house arrest by permitting them to have a golf cart that would grant them access to the community.
(G. 15, p 13). Lobeck said that the Association should not worry about vandalism to the golf cart because it was Agnes Guard's. Lobeck said the Guards wanted to put the cart outside, near their patio, where ozone discharge would not be a problem. He invited the Association members to go out and look at the proposed spot. (G. 15, p 13). Board Member Mohney said that Unit #4 (the Guards') was without friendship, and he suggested that the Board consider a motion to ask Agnes Guard to move where there are proper facilities, rather than everyone being "asked to accommodate". (G. 15, p 14). The tape recording reveals that Mohney meant "ramps, spots for motorized vehicles,and so forth" as the proper facilities. (G. 27). When Lobeck asked if they were asking Agnes Guard to leave her home, someone shouted that that would solve the problem completely. (G. 15, p. 14). The meeting then turned into a shouting match and Agnes Guard and Lobeck left. (Tr. 106-107; G. 15, p. 15; G. 27). After Agnes Guard and Lobeck left, the members of the Association continued to discuss the Guards. One member, Margaret Mason, stated that Agnes Guard wanted a golf cart and "never mind that nobody else wants to look at it." (G. 15, p. 16). Another member, Vercaemert, stated he would buy a motorized car to be kept on the terrace and he would install and remove a portable ramp each time he wanted to use it. (G. 15, p. 16). The minutes reflect[8] that McClenathen said that every condominium has at least one trouble maker. He also said that unless a proposed modification posed a health hazard, Agnes Guard could put in any handicapped device she liked, such as a permanent ramp or electrical lift, and that the Association would have to let her have the golf cart. (G. 15, p. 18). He went on to say that HUD people were very liberal and unreasonable, and that they did not care about the effect of modifications on the other nine unit owners. McClenathen continued that Agnes Guard would be able to have all three modifications,, but she would have to pay for them. (G. 15, p. 19). McClenathen advised the members that Agnes Guard would be responsible for the upkeep of the modifications, but the liability insurance the Association already had would likely cover the modifications. (G. 15, p. 19). McClenathen pointed out that everything Agnes Guard had done so far, except hiring the attorney, had not cost her anything. The complaint letters cost her

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[7] In addition to the minutes (G. 15), tape recordings of the meeting were introduced into evidence. (G. 27; R. 33).

[8] The tape recordings ended before this portion of the meeting.

nothing and McClenathen said that if the Association could avoid noncompliance, she could not use complaint letters and would have to go to court.
(G. 15, p. 19).

By letter dated May 3, 1990, Lobeck advised McClenathen that the Guards simply wanted to park a golf cart behind their unit, cover it with a quality tarpaulin, and install a small opening in the screen porch enclosure through which they could run an electrical cord into the unit to charge the cart. He stated the Guards' earlier suggestion about the shed had been previously withdrawn, in part, because of the expense. Lobeck stated that vandalism was not a concern to the Association and should be concern only to the Guards. Lobeck said that because the cart would be outside, the build up of hydrogen gas was not a problem and that there was no reason why the Association needed to know the size, model, and manufacture of the golf cart because the Guards had not purchased the golf cart yet and could not do so until they received permission to park it on Association property. Lobeck also stated that questions concerning maintenance responsibility and the planned time frame for placement of the golf cart were not

relevant, under the Act, for Association approval for parking. (G. 16). McClenathen did not respond to this letter. (Tr. 108).

Within two weeks of Lobeck's letter of May 3, 1990 (G. 6), Vercaemert became president of the Association and Susan Foster became secretary. (Tr. 367, 444). Both Vercaemert and Foster testified that the Board took no further action on the Guards' request after May 1990. (Tr. 446, 400-401).

By letter dated June 27, 1990, Jacquelyn J. Shelton, HUD's Director, Office of Fair Housing Enforcement and Section 3 Compliance, advised the Association that HUD's processing of the Guards' complaint was not yet complete, and that if it needed more information, HUD would contact the Association. The letter went on to state, "We are expediting this matter. No further actions are required from you at this time."
(G. 38). This letter went on to inform the Association whom it should contact if it had any questions. (G. 38).

Vercaemert testified that the Board assumed the HUD official's statement that "No further actions are required from you at this time" meant that the Board could not act on the Guards' requests and that the Association's hands were tied. (Tr. 400). The Association took the letter as an instruction from HUD not to take any further action on the Guards' requests. (Tr. 401).

George Guards' health continued to deteriorate, and he died on March 27, 1992. (Tr. 234). Agnes Guard was named an executrix under George Guard's will, and her attorney filed, and probated the will. (Tr. 363).

Discussion and Conclusions of Law

I. Legal Framework.

The Fair Housing Act was enacted to ensure the removal of artificial, arbitrary, and unnecessary barriers which operate invidiously to discriminate on the basis of impermissible characteristics. *United States v. City of Black Jack,* 508 F.2d 1179, 1184 (8th Cir.), *cert. denied*, 422 U.S. 1042 (1974). The Act was designed to prohibit "all forms of discrimination, sophisticated as well as simple-minded." *Williams v. Mathews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

In 1988 the Act was amended to make it unlawful to discriminate in the sale or rental of housing because of a handicap of a buyer or renter, anyone residing or intending to reside in the housing, or any person associated with a handicapped buyer or renter. 42 U.S.C. § 3604(f)(1).

In amending the Act, Congress recognized that people with disabilities are subject to artificial, arbitrary, and unnecessary barriers preventing them from making full use of housing. Congress also recognized that more than a mere prohibition against disparate treatment was necessary so that handicapped persons receive equal housing opportunities. *Secretary of HUD v. Dedham Housing Authority,* 2 Fair Housing-Fair Lending para. 25,015 at 25,211 (HUDALJ Nov. 15, 1991) (*Dedham I*)[9], *citing* H.R. Rep. No. 711, 100th Cong. 2nd Sess. 25, *reprinted in* 1988 U.S. Code Cong. Admin. News 2186 ("H.R. No. 711"). Accordingly, handicap discrimination includes compliance with certain affirmative obligations. Discrimination on the basis of handicap includes, *inter alia*,

> "...a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises." 42 U.S.C. § 3604(f)(3)(A), *See also* 24 C.F.R. § 100.203;

and

> "...a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B), *See also* 24 C.F.R. § 100.204.

A handicap is defined in the Act as, *inter alia,* "a physical or mental impairment which substantially limits one or more of ...[a]...person's major life activities." 42 U.S.C.

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[9] This case was remanded to the Administrative Law Judge by the Secretary for reconsideration of his original findings concerning a civil penalty. The Initial Decision on Remand and Order did not change the analysis in the first decision as it concerned the violation and the compensatory damages. *Secretary of HUD v. Dedham Housing Authority,* 2 Fair Housing-Fair Lending ¶ 25, 023 at 25,272 (HUDALJ Feb. 2, 1992) (*Dedham II*).

§ 3602 (h)(1).*See also* 24 C.F.R. § 100.201.

Failure to accommodate handicaps when it is reasonable to do so is also referred to as "surmountable barrier" discrimination. *Prewitt v. United States Postal Service*, 662 F. 2d 292 (5th Cir. 1981); *Dedham I* at 25,211.

The Fair Housing Act's prohibition on handicap discrimination is interpreted in a manner consistent with § 504 of the Rehabilitation Act of 1973. *See Dedham I* at 25,212; H.R. No. 711 at 25; and 29 U.S.C. § 504. An accommodation which permits handicapped tenants to experience the full benefit of tenancy must be made unless the accommodation imposes an undue financial or administrative burden on a respondent or requires a fundamental alteration in the nature of its program. *Dedham I* at 25,212, *citing Southeastern Community College v. Davis,* 442 U.S. 397 (1979), and *Marjors v. Housing Authority of Cty. of Dekalb, Ga.*, 652 F. 2d 454 (5th Cir. 1981). The only difference in analyses of matters arising under the Fair Housing Act and the Rehabilitation Act of 1973, is that the Fair Housing Act's provision for modifications contains the requirement that those modifications be at the handicapped person's expense. 42 U.S.C.§ 3604(f)(3)(A).

A case of handicap discrimination is made by proving that:

1. the complainant has a handicap or is a person associated with a handicapped person;
2. the respondent knows of the handicap or should be reasonably expected to know of it;
3. modification of existing premises or accommodation of the handicap may be necessary to afford the complainant an equal opportunity to use and enjoy the dwelling; and
4. the Respondent refused permission for such modifications, or refused to make such accommodation.

See Dedham I at 25,212.

Once the Charging Party has established all the foregoing, Respondent may yet prevail if it can demonstrate that an accommodation to the handicap imposes an undue financial or administrative burden on Respondent or requires a fundamental alteration in the nature of its program; i.e. that the accommodation is not reasonable. *Dedham I* at 25,212.

The Association, citing *HUD v. Blackwell*, 908 F. 2d 864, 870 (11th Cir. 1990), urges that *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973) should be applied in analyzing this case. This approach is not appropriate in the subject case. The approach urged is used when motivation is a necessary element of the case. The subject case involving a handicapped person's rights to make certain modifications and accommodations involves no element of bad motivation. Thus the *McDonald Douglas* and the *Blackwell* analyses are inappropriate. *See Dedham I.*

II. The Guards and the Association.

HUD alleges that the Association violated 42 U.S.C. § 3604(f)(2) and (3)(A) and (B) by discriminating against the Guards by refusing to permit them to make certain modifications to their unit and the common areas, and by refusing to permit them to own and park a handicap van and golf cart on the premises of Ocean Sands.

Ocean Sands contends that it did not violate the Fair Housing Act because, in essence, it did not refuse the Guards permission to make reasonable modifications or to own and park the two vehicles.

There is no dispute in this case that George Guard was protected by the Fair Housing Act because he was handicapped and severely impaired with respect to his mobility. He met the definition of a person with a handicap. 42 U.S.C. § 3602(h)(1) and 24 C.F.R. § 100.201. In fact he was confined to a wheelchair during most of the events that gave rise to this case. Agnes Guard, George Guard's wife and principal care giver, was also protected by the Act because she was associated with a person with a handicap. 42 U.S.C. § 3604(f)(2)(C). Further, there is no dispute that the Association, members of the Board, and unit owners were aware of George Guard's handicap, and that his handicap was the reason the Guards requested the modifications that are the subject of this case.

III. The Accommodations and Modifications Sought by the Guards.

A. The Handicap Van.

In their letter of March 30, 1989, the Guards requested, *inter alia*, permission to park a handicap van in their assigned parking space at Ocean Sands. Such a request by the Guards, necessitated by the Associations Rules and Regulations which prohibit the parking of recreational vehicles, vans, etc. on the Ocean Sands' property, was a "reasonable accommodation" to the Association's "rules, policies, [and] practices..," and was necessary to afford George Guard an equal opportunity to enjoy his dwelling within the meaning of 42 U.S.C. § 3604(f)(3)(B).

In its letter of April 5, 1989, the Association, among other things, granted the Guards permission to have the handicap van, but requested that the Guards provide the Association with the make, year, and description of the vehicle. The Association also stated in its letter that the Board may examine the vehicle to verify that it was, in fact, specially equipped to transport a handicapped person.

HUD argues that the information requested by the Association and the statement that the Board may inspect the van were such onerous conditions as to constitute a denial of the Guards' request for permission to have a handicap van.

I conclude that the Association, in its April 5, 1989 letter, did grant the Guards permission to park a handicap van in their parking space at Ocean Sands. The information that

the Association requested was reasonable and most certainly was not onerous. It would have enabled the Association representatives to be sure that any van parked on the premises was the Guards' van and not one for which permission had not been granted. Further, the right of inspection that the Association might exercise was, again, quite reasonable in that it enabled the Association to assure itself that the Guards were, in fact, using a handicap van, for which they had received permission; and the right of inspection would not have interfered with the Guards' use or enjoyment of the van. Finally, I find that the Association did not unduly or unreasonably restrict the Guards'
use of the van. In this regard I note that I discredited Agnes Guard's testimony that Barksdale made statements restricting the Guards' use of the van.

In light of the foregoing, I conclude that the Association did not violate the Act with respect to the Guards' request to park a handicap van in their assigned parking space at Ocean Sands.

B. Wheelchair Lifts and Walkways.

Subsequent to the April 5, 1989 letter, the Guards hired Yeatts, a civil engineer, to design plans to give George Guard greater access to the Ocean Sands grounds. Yeatts came up with plans that provided for a wooden plank walkway across the loose pebble lot to Golden Beach Boulevard, for a wheelchair lift from the Guards' patio to the ground, and for a wooden plank walkway from the lift to an existing walkway.

By letter of July 28, 1989, Lobeck forwarded these plans and a wheelchair lift brochure to McClenathen. Lobeck's letter stated that the Guards desired to modify the condominium's common elements, at their expense, to provide handicap access from their unit to the pool area.

These modifications to Ocean Sands' common elements by the Guards were very reasonable and were necessary to afford George Guard full enjoyment of the premises; in this case they permitted him access to the grounds near the pool and the Gulf, which he so enjoyed. *See* 24 C.F.R. § 100.204. Further, the proposed modifications would have minimally, if at all, interfered with the enjoyment of the Ocean Sands common property by the other residents, and the modifications were not unsightly. These were the very type of modifications described and envisioned in 42 U.S.C. § 3604(f)(3)(A).

Lobeck, in his August 11, 1989 letter, responding to prior communications with McClenathen, stated that the Guards were willing to withdraw their request for the walkway over the gravel parking lot if the Association approved the other work, including the wheelchair lift. Lobeck stated that the Guards had not yet determined which wheelchair lift model would be installed, and that the specific choice was not relevant since none of the models should be objectionable to the Association. Also Lobeck rejected McClenathen's suggestion that a ramp over the stairs might be an alternative to the wheelchair lift because such ramp would be too steep. The Guards also rejected the suggestion that Association approval be contingent upon the

Guards signing a form regarding maintenance and liability, and the Guards rejected any suggestion that the plans they had submitted were insufficiently detailed. Lobeck, however, stated that the Guards offered, as an alternative to the wheelchair lift, a shed on the common elements for storage of a golf cart for transporting of George Guard. The letter indicated that if the Association approved the shed and golf cart, it should advise the Guards of the location the Association preferred so the Guards could submit a formal request. Lobeck stated that if the Association did not approve this latter request, the request for approval of the wheelchair lift stood as submitted.

McClenathen, by letter dated August 25, 1989, asked a number of questions about the golf cart and shed proposal, and stated that the application for installation of the electric lift and other improvements was to be held in abeyance pending response to the letter.

In his letter of September 28, 1989, to McClenathen, Lobeck altered the Guards' proposal concerning the golf cart, and stated that the Guards were placing in abeyance, their request for the installation of the wheelchair lift and walkways.

The Association and the Guards discussed the golf cart option for the next few months, but after agreement could not be reached, the Guards renewed their request for the wheelchair lift and walkways in Lobeck's November 27, 1989 letter to McClenathen.

In McClenathen's reply letter of December 19, 1989, after discussing the golf cart request, McClenathen stated that the Association could not grant or deny the requested walkway to the pool until it determined whether there were underground cables pipes, lines, etc. and, depending on the locations of these items, the Association might find it necessary to change the location of the proposed walkway. Further, McClenathen stated that he had been informed that the Guards had "as-built" drawings of the community and McClenathen demanded these drawings be delivered to a Board member. McClenathen stated that upon receipt of these drawings the Board could evaluate the proposal for the installation of the walkway.

In his February 2, 1990 letter Lobeck advised McClenathen that the Guards did not have "as-built" drawings, but offered the Association the opportunity to copy whatever specifications and plans the Guards did have. Lobeck stated that he thought the Association was stalling.

In his letter of March 15, 1990, McClenathen discussed the golf cart request, but did not mention the request for the wheelchair lift and walkways.

At the March 30, 1990, Association meeting, the tenor of the meeting was generally hostile to the Guards and their requests for modifications and accommodations. It was suggested that the Guards might consider moving where there were proper facilities rather than asking everyone to accommodate. At this meeting, it should be noted that, after the Guards left, McClenathen advised the remaining unit owners that the Guards could make the modifications and obtain the cart, but that the Guards would have to pay for them, and would probably have to

pay for their upkeep.

The Association took no further action on any of the Guards' requests after May 1990. In the June 27, 1990 letter from the HUD Director of Fair Housing Enforcement, the Association was advised that the investigation of the Guards' complaint had not been completed and that, if more information was needed, HUD would contact the Association. This letter stated that no further actions were required of the Association at that time. The Board took this last statement to mean that the Board could not act on the Guards' requests, and that the Association's hands were tied.

As stated above the Guards' requests for permission to install the wheelchair lift and walkways, at their own expense, were reasonable and the kind of modifications envisioned and authorized under 42 U.S.C. § 3604(f)(3)(A).

The Association argues that it did not reject the request for the wheelchair lift and walkways. Rather the Association argues that the Guards withdrew and changed the requests before the Association had an opportunity to decide upon them, after the Association asked for reasonable and non-burdensome information.

In light of the entire course of events with respect to the request for the wheelchair lift and walkways, I conclude that the Association engaged in dilatory conduct and delaying tactics aimed at defeating the Guards' attempts to make the Ocean Sands property accessible to George Guard.

The plans prepared by Yeatts and submitted by the Guards in the July 28, 1989 letter, were sufficiently detailed, precise, practical, and in accordance with the general ambience of the Association's common property to permit the Association and its Board to consider the plans and grant them. The Guards reasonably asked for expedited consideration. However, before the Association had a reasonable time in which to rule, the Guards submitted their golf cart alternative and, after the Association and the Guards engaged in some discussion about the golf cart suggestion, the Guards placed the request for the wheelchair lift and walkways in abeyance by letter dated September 28, 1989. These actions by the Guards, in effect, placed the request for the wheelchair lift and walkways out of consideration while the golf cart was being considered. Accordingly I conclude that, as of September 28, 1989, the Association had not denied the Guards' request for the wheelchair lift and walkways.

The Guards renewed their request for the wheelchair lift and walkways by letter of November 27, 1989. At this point the Association stated that it could not rule on the request until it determined whether there were underground cables, pipes, lines, etc., and it requested "as-built" drawings from the Guards, stating that it would evaluate the proposed walkway after the Association received these drawings.

Yeatts' uncontradicted testimony was that his plans were sufficiently detailed to permit consideration, and that a contractor would have been able to follow them and installed the

walkway. (Tr. 178-186; Tr. 200; Tr. 208-209; G. 20; G. 21). He also stated that the walkway was on the surface and required digging down only a very few inches, above any electrical or water pipes that had been sunk. He did say, with respect to the sprinkler system, that the contractor would be able to identify these lines and could avoid them. (Tr. 202-204; 209). Thus, the Association had all the information it needed to approve this request, but it did not do so. In these circumstances, the Association's request for the "as-built' drawings and its statement that it needed to ascertain the location of the cables, pipes, lines, etc. before it would evaluate the request was merely an attempt to stall the procedure and to avoid making a decision. In this regard, the Association did not grant the permission to install the wheelchair lift, nor did it decide whether the walkways could be put in, subject to ensuring that they did not interfere with pipes, cables, etc. Rather, the Association kept stalling and refusing to grant approval. Thus from the renewal of the request for the wheelchair lift, the Association failed and refused to permit the Guards to make these modifications to which they were entitled to make under the Act.

There seems to be some contention that the Guards did not specify which of the wheelchair lifts in the brochure they intended to install. There really were only two models of wheelchair lifts, with some differences as to the height needed. These were substantially similar models and either of them was a reasonable modification. I note that the Association never indicated if it had a preference or if one was unacceptable, and why. Rather, the Association just never ruled upon the Guards' request.

There was some dispute as to a liability and maintenance agreement, but, again, this was a way to delay approving the modifications. McClenathen, at the Association meeting, indicated the Association's liability insurance would cover the modifications. Further, as to the wheelchair lift, it was substantially part of the Guards' unit. They would, of course, maintain it or lose the use of it. Also, there is no showing that the maintenance of the walkways would have been other than negligible. (Tr. 205).

Finally, the Association argues it did not rule upon any of the requests after the June 27, 1990 letter from HUD, because it was felt the letter was an instruction not to take any further action. This is clearly an erroneous reading of the letter and is an argument that has no merit. This HUD letter was some seven months after the Guards had, on November 27, 1989, renewed their request for the wheelchair lift and walkways. Thus by the time the HUD letter had been received, the Association had effectively denied the Guards permission to make the requested modifications for many months. Further, the letter's meaning was quite clear. It stated that the investigation was continuing, HUD would contact the Association if it needed anymore information, and no further action was required of the Association at that time. This last statement was referring to the investigation. HUD advised the Association that it would be contacted if more information was needed and that, absent such contact, the Association needed to do nothing with respect to the investigation. It is an unreasonable interpretation of this sentence that HUD was forbidding the Association from taking any steps to comply with the Fair Housing Act or even that HUD was saying that during the pendency of the investigation the Association need not comply with the Act. Such interpretations defy reason and logic.

When viewed as a whole, the Association's conduct was designed to delay ruling on the Guards' requests. The Association did not want these modifications made, so it stalled. This is, in effect, what McClenathen suggested at the Association meeting and is consistent with the Association's conduct before the Fair Housing Act amendment to include the handicapped. Officials of the Association expressed their desire not to have a handicapped person there when they suggested the Guards should consider moving.

In light of all of the foregoing I conclude that since on or about November 27, 1989, until March 27, 1992, the date of George Guard's death, the Association violated 42 U.S.C. § 3604(f)(3)(A) and (B) by having, for all practical purposes, refused the Guards' request to install a wheelchair lift and wooden walkways, which were reasonable modifications of existing premises to have afforded George Guard full enjoyment of the premises, and by having refused to make reasonable accommodations in rules, policies, practices or services when such accommodations were necessary to have afforded George Guard equal opportunity to use and enjoy his dwelling.

C. Golf Cart.

Agnes Guard decided to ask for permission to use a golf cart at the Ocean Sands property because it was a simple solution to enable George Guard to move around and enjoy this property. The Guards first suggested that they be permitted to own and park a golf cart on the Ocean Sands' property in Lobeck's August 11, 1989 letter. In this letter the Guards suggested, as an alternative to their request for the wheelchair lift and walkways, that a shed be erected on the common elements for the storage of a golf cart to be used to transport George Guard. The letter stated that if the Association approved of this suggestion, it should advise of the location it preferred for the shed, and that the Guards could submit a formal request.

The Association, in McClenathen's August 25, 1989 letter, stated that a majority of the Board expressed support for the suggestion and recommended two locations that the shed might be acceptable. The letter set forth the requirements any request from the Guards must include. These requirements included information about the golf
cart, the shed and its construction, the arrangements for electrically charging the cart, and responsibility for maintaining the shed.

After receipt of the August 25, 1989 letter, Agnes Guard talked to Yeatts about the procedure to follow in constructing a shed. She was informed of the need for obtaining state and local permits. Because the Guards wanted to get access to the grounds as soon as possible, and because building a shed would be costly, they abandoned their request for a shed. Thus Lobeck, in his letter of September 28, 1989, stated that the Guards, for the time being, were foregoing the shed and would instead cover the cart with a tarpaulin or other suitable material. Lobeck stated that the cart would be parked at the northwest corner of the Guards' patio so it would be near an electrical outlet for recharging.

The Board, at its October 19, 1989, meeting, considered the Guards' request for the golf cart, covered by a tarpaulin or other suitable material. The board refused the request because it was felt the cart would present an unsightly view to other owners. The Board also felt that, because it favored the construction of the shed, it could not agree to this current request for safety reasons and concern about vandalism. These minutes were forwarded to Lobeck in a letter dated November 8, 1989. Barksdale testified that it was felt that the tarpaulin would be marred by bird droppings and dirt. (Tr. 550). The cars parked at Ocean Sands also get dirty. (Tr. 550).

By letter dated December 19, 1989, McClenathen stated that the anticipated location of the golf cart was acceptable, but covering it with a tarpaulin was not, and the Board requested that the golf cart be stored in an acceptable shed. McClenathen stated that the specifications for the shed should be submitted to the Board. He stated that the shed would insure minimal effect on the exterior appearance of the community and would alleviate safety hazards associated with the unprotected storage of a golf cart and related electrical apparatus.

Lobeck, in his February 2, 1990 letter stated he felt the Association was engaged in delaying tactics and on February 20, 1990 the Complaint herein was filed.

McClenathen's letter of March 15, 1990, stated that the Guards first proposed the shed and, when asked for specifications about storage, stated the general location for storing the cart and that it would be covered by a tarpaulin. McClenathen stated that this was not sufficient to permit the Association to make a decision. McClenathen said the Board had contacted several companies that sell and service golf carts and which advised that because golf carts are a prime target for vandalism and theft by teenagers, they be kept in a secure location. He stated that a shed or other structure was the best protection from the elements, and that it must be well ventilated with a fan. He stated that a 25 amp circuit breaker must be provided, that hydrogen gas would be a problem unless the area is well ventilated during charging, and that a defective battery or charger could cause a fire unless UL approved. McClenathen's letter then repeated the request for all the information asked for in the August 25, 1989 letter.

At the March 30, 1990 Association meeting, hostility to the Guards was shown by the other unit owners. Lobeck advised the unit owners that they should not worry about vandalism because the golf cart belonged to the Guards. He also stated that the Guards wanted to keep the golf cart outside, near their patio, where ozone discharge would not be a problem. Lobeck invited the Association members to go out and look at the proposed spot.

Again, by letter dated May 3, 1990, Lobeck repeated the Guards' request to park the golf cart behind their unit, to cover it with a tarpaulin, and to install a small opening in the screen porch enclosure to run an electrical cord into the unit to charge the cart. Lobeck repeated that vandalism was not a concern of the Association and should only be a concern to the Guards. Lobeck also stated that the Guards could not provide the specific information requested about the golf cart because they had not yet purchased it, and could not purchase one until they

received permission to park it on the Association property.

The request by the Guards to park a golf cart behind their unit so that George Guard would have access to the Ocean Sands property and the Gulf, which he so enjoyed, was a simple, reasonable, and practical request. It was a relatively cost effective way to provide George Guard access to and enjoyment of the common property relatively quickly, without the need for substantial modifications to the facilities. There was no response to this letter, and the Association took no further action on the Guards' request to park a golf cart behind their unit and to cover the cart with a tarpaulin.

The Guards' request of September 28, 1989, to park a golf cart at the northwest corner of their patio and to cover it with a tarpaulin was a simple, reasonable, and practical solution to the problem of promptly providing George Guard access to the Ocean Sands property and an opportunity to enjoy the grounds and the Gulf. It was a reasonable request that was cost effective and could be achieved quickly. In order to save time, so that George Guard could quickly have access to the property, the Guards abandoned their request for a shed in which to store the cart, because it involved planning time and time to obtain the required permits, not to mention the time it would take to obtain the Boards' approval of the plans, and because it was expensive.

The request to park the golf cart, covered with a tarpaulin, was a request for a reasonable accommodation to the Association's rules, policies, and practices which would have afforded George Guard an equal opportunity to use and enjoy his dwelling, including Ocean Sands' property. Thus it was protected by 42 U.S.C. § 3604(f)(3)(B). Further, since this also involved some minor construction change in the Guards' unit, so they could run an electric line into the unit to charge the golf cart, it involved a reasonable modification of the unit protected by 42 U.S.C. § 3604(f)(3)(A).

The Association refused and failed to grant the Guards permission to park the golf cart, covered with a tarpaulin, near their unit. The Association's treatment of the Guards' request was designed to, and had the effect of, unduly delaying and stalling any decision on the Guards' request. The Association did not approve the use of the golf cart and then ask for the identifying information about the golf cart, nor did the Association set forth what size or propulsion system it required. Rather it asked for this information before ruling on the request, which it could presumably deny if it did not approve of the propulsion system or size of the golf cart.

The Association's alleged confusion about where the golf cart would be parked was, again, disingenuous. The September 28, l989 letter stated the golf cart would be parked at the northwest corner of the Guards' unit. That is quite specific. The Association apparently was not sure whether this meant the north side of the northwest corner or the west side of the northwest corner. However, during the correspondence this question about location was not raised until the March 15, 1990 letter which stated that the suggestion of storing the cart under a tarpaulin merely set forth the "general location" and that was not sufficient to permit the Association to make a decision. When there was a question raised at the March 30, 1990 Association meeting,

Lobeck invited the members to step outside and see the proposed spot. No one took him up on the offer. Also, if the Association felt the north side of the northwest corner was unacceptable, it could have granted the Guards permission to park the golf cart on the common property, but told them that the north side of the northwest corner was unacceptable. Rather, the Association only raised the objection or question as to parking location to stall consideration of the Guards' request.

Similarly, the Association, as reflected in the October 1989 minutes, refused permission to cover the cart with a tarpaulin because it would allegedly be unsightly and there would be problems of safety and vandalism. The Association insisted upon a shed. The Association, in McClenathen's March 15, 1990 letter, stated that golf carts are prime targets of vandalism and theft. The record fails to demonstrate that golf carts are particular objects of vandalism and theft. In fact the only direct evidence on this point, the testimony of a golf cart dealer who is also very knowledgeable about the care and maintenance of golf carts, indicates that golf carts are not prime subjects of vandalism (Tr. 435-436). Further he testified that there are anti-theft features available, that it was safe and appropriate to store a golf cart outdoors, and that there are covers designed to cover a golf cart. (Tr. 432-435). He also testified that it was safe to charge the cart outdoors by plugging it into a normal 110 volt grounded outlet that is normally found in a home (Tr. 431), and that there was no safety problem from hydrogen. (Tr. 433-434). Thus, although a 25 amp circuit breaker might be a good idea, it was not necessary for safety. (Tr. 431, 437).

Further it was clear that because the Guards would own the golf cart, any vandalism would be their problem. Lobeck specifically stated this at the Association meeting. There had been some vandalism to Association property, but it took no specific steps to avoid this problem in the future.

There was no showing that a golf cart covered by an appropriate tarpaulin would have been unsightly. The argument that bird droppings on the tarpaulin would have made it unsightly is an example of the extremes to which the Association went to deny the Guards' reasonable request. Again, these were issues raised to avoid granting the Guards' requests. The objections by the Association to the golf cart were groundless and merely a way to stall and raise issues so that the Association could avoid granting the Guards permission. Similarly, the Association was stalling when it kept insisting upon a shed, asking about specifications, maintenance, and liability, but not saying what type of shed it would approve after the Guards had asked permission for the tarpaulin.

The Associations' argument that it was appropriate to refrain from acting after it had received the HUD letter of June 27, 1990, is rejected for the reasons set forth above, in the discussion of this letter and the wheelchair lift and walkways.

The Association, by its stalling and dilatory conduct, in effect denied the Guards' reasonable request to park a golf cart behind their unit, cover it with a tarpaulin, and charge it by

a line into their apartment.

The Act states that it is unlawful to refuse to permit a handicapped person to make reasonable modifications and to refuse to make reasonable accommodations. 42 U.S.C. § 3604(f)(3)(A)&(B). The Act does not indicate that if the Association had other reasonable alternatives, which it did not in this case, that it could have imposed its alternatives upon the Guards. Rather, under the Act, if the Guards' proposed modifications and accommodations were reasonable, refusing permission was unlawful.

Accordingly, I conclude that from September 28, 1989, the date the Guards proposed the golf cart and tarpaulin, to March 27, 1992, the date George Guard died, the Association violated 42 U.S.C. § 3604(f)(3)(A) because it refused to permit the Guards to make reasonable modifications of the premisses, and it violated 42 U.S.C. § 3604(f)(3)(B) because it refused to make reasonable accommodations in its rules, policies, and practices.

Additionally, noting the Association's repeated refusals to grant the Guards' reasonable requests and the hostility to the Guards expressed by owners and Association officers because they had requested the modifications, I conclude the Association's conduct constituted discrimination based on handicap in violation of 42 U.S.C. § 3604(f)(2).

D. Standing of Agnes Guard.

The Association argues that Agnes Guard had no standing under Florida law to bring this action on behalf of George Guard because no evidence was presented that letters of administration had been issued to Agnes Guard as personal representative of the Estate of George Guard. Agnes Guard testified that she was named as executrix under her husband's will and that her attorney filed the will and took other necessary action to probate the estate.

The Association could have submitted estate records to show that she was not, in fact, the personal representative of the estate. In the absence of such evidence, Agnes Guard's testimony stands unrebutted. Accordingly, I conclude that Agnes Guard's testimony was sufficient to establish that she was named the personal representative of the Estate of George Guard, and that she has standing to bring this action as the personal representative of the Estate of George Guard.

III. Remedies.

A. Compensatory Damages.

Complainants are entitled to recover damages for intangible injuries such as embarrassment, humiliation, and emotional distress. *See, e.g., HUD v. Blackwell,* 2 Fair Housing-Fair Lending (P-H), ¶ 25,001 at 25011 (HUDALJ Dec. 21,1989) (hereinafter *Blackwell*

I), *aff'd* 908 F.2d 864 (11th Cir. 1990) (*Blackwell II*); *HUD v. Murphy,* 2 Fair Housing-Lending (P-H) ¶ 25,002 at 25055 (HUDALJ July 13, 1990); *See also Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976); *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (10th Cir. 1973); *McNeil v. P-N & S. Inc.*, 372 F. Supp. 658 (N.D. Ga. 1973); *HUD v. Jarrad,* at 25,091. Damages for emotional distress may be based on inferences drawn from the circumstances of the case, as well as on testimonial proof. *Blackwell II,* at 872; *Murphy* at 25,055; *See also Marable v. Walker,* 704 F. 2d 1219,1220 (11th Cir. 1983); *Gore v. Turner,* 159 F.2d 159, 164 (5th Cir. 1977). Because emotional injuries are by nature qualitative and difficult to quantify, courts have awarded damages for emotional harm without requiring proof of the actual dollar value of the injury. *See, e.g., Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.* at 384; *Blackwell I* at 25,011; *Blackwell II* at 872-73. The amount awarded should make the victim whole. *See HUD v. Murphy* at 25,056; *Blackwell I* at 25,013. Thus, although this tribunal is accorded wide discretion in setting damages for emotional distress, the key factors in determining the size of such award are the egregiousness of the respondent's behavior and the victim's reaction to the discriminatory conduct. The record, as a whole, must support an emotional distress award. *See, Lee Morgan v. Secretary of Housing and Urban Development,* 785 F 2d 1451 (10th Cir 1993).

In a fair housing case, discriminators must take their victims as they find them; and damages are measured on injuries actually suffered by the victim and not on the basis of the injuries that would be suffered by a reasonable person. *HUD v. Kelly,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,034 at 25,362 (HUDALJ August 26, 1992). In the subject case both of the Guards were particularly fragile and easily subjected to emotional distress because they were simultaneously affected by George Guard's handicap and deterioration. The record establishes that the Guards were a very devoted couple with a lifelong commitment to care for each other. (Tr. 225, 238). HUD asks for an award of at least $30,000[10] for the Guards' emotional distress, humiliation, and loss of important housing opportunity.

The Association's violations of the Fair Housing Act prevented George Guard from enjoying the Ocean Sands' property, including the pool area and the overlook of the Gulf. Access to these areas had been greatly enjoyed by him in the past. He was, in effect, a prisoner, confined to his unit by the Association's conduct. When he was able to get outside, after his disability, he was more alert and would look around and pay attention to what was happening. He would smile and stay awake. (Tr. 425). Getting to the Gulf would have helped his frame of mind (Tr. 423) and given him something to look forward to when he got up in the morning. (Tr. 262). George Guard lived his last years feeling he was a burden to his wife. (Tr. 281). For a period of over two years, from September 28, 1989, to March 27, 1992, George Guard lived in his unit without the ability to access and enjoy the Ocean Sands property, because of the Association's unlawful conduct.

Based upon the nature of the refusal to permit George Guard to enjoy the property, his

[10]The award was not apportioned between the Guards.

disappointment, his frustration, and the relatively long period of time he experienced this emotional distress, I conclude that George Guard suffered substantial emotional distress. Because he was unable to enjoy Ocean Sands' common property he was denied an important housing opportunity that, in his case, would have been very therapeutic, as well as pleasurable. Accordingly, Agnes Guard, in her capacity as personal representative of the estate of George Guard, is awarded $5,000 for George Guard's emotional distress, humiliation, and loss of an important housing opportunity.

With respect to Agnes Guard, she experienced frustration because she could not provide George Guard a better quality of life. Because of the Association's conduct she was unable to enjoy their final years together. Her experience was heartbreaking and upsetting. There was also the frustration knowing that they paid a great amount of money so that they would be in a place to enjoy their surroundings, and were denied this enjoyment. The actions of her neighbors humiliated and embarrassed Agnes Guard and made her feel unwanted. (Tr. 304). She continues to experience this emotional distress and feelings of failure. (Tr. 309-311). Further, because Agnes Guard spent most of her time caring for her husband, the Association's actions substantially prevented her from enjoying the common property, thereby denying her a substantial housing opportunity.
My observation of Agnes Guard's demeanor when she testified about the extent of her emotional distress support her claim that she suffered, and continues to suffer, substantial emotional distress. Accordingly, Agnes Guard is awarded $8,500 for emotional distress, humiliation and loss of an important housing opportunity.

HUD also asks that the Guards' be awarded certain out of pocket expenses incurred as a result of the Association's discriminatory conduct. HUD asks that the Guards be awarded $6995.50, representing one half of the maintenance fees, the portion that went for the maintenance of the grounds and the pool of Ocean Sands, paid by the Guards from March 30, 1989, until George Guard's death.

The Association's conduct prevented the Guards from using and enjoying the common elements and the pool. The Guards therefore suffered damage to the extent that they paid for the maintenance of the common elements and pool, but were prevented from using and enjoying them. They are entitled to be repaid by the Association the amount they paid for use of the common elements. This is not a refunding of any portion of their maintenance fee; rather, it is a measure of the out of pocket damage incurred by the Guards because of the Association's unlawful conduct which prevented the Guards from enjoying the money they had expended on maintenance of the common elements.

The Guards paid quarterly maintenance fees. (G. 28). Agnes Guard, a former member of the Board estimates that the bulk of the maintenance fees collected by the Association goes for maintenance of the common elements and the pool. (Tr. 355). The Guards were unable to establish precisely what portion of the maintenance fees went for the maintenance of the common elements and pool; rather they ask for one-half the maintenance fee as damages for their being denied access and enjoyment of the common elements. (Tr. 313). The Association

had information peculiarly within its knowledge about the portion of the maintenance fee spent for maintaining the common elements, but introduced no evidence to establish it. Accordingly, I reject the Association's argument that the Guards did not adequately prove the portion of the maintenance fee that paid for the maintenance of the common elements and the pool. In the absence of evidence to the contrary, I conclude that Agnes Guards' estimate that one-half of the maintenance fees went for maintaining the common elements and pool is reasonable. Thus the Guards were damaged to the extent they paid this amount and were denied the enjoyment of and access to the common elements.

The Guards were damaged to the extent that the Association prevented them from gaining access to or enjoyment of the common grounds from September 28, 1989, until March 27, 1992. The Guards made a total of $11,741.00 in maintenance payments covering this period (G. 28) and one-half of this amount is $5,870.50. In light of the foregoing the Guards are awarded $5,870.50 to compensate them for their out of pocket expenses paid for maintenance of the common elements.

HUD also asks that the Guards be awarded $4,967.24 to reimburse them for Lobeck's fees incurred prior to the issuance of the Charge. (Tr. 114; G. 17). Lobeck testified that there were other matters, in addition to the handicap matters, that were discussed and dealt with during the times billed and submitted herein. There were allegedly other areas in which the Association was not conforming to other laws. Lobeck testified that these other matters were raised for strategic purposes. These other matters were raised to provide Lobeck leverage to obtain handicap access. (Tr. 166-170).

The bills presented did not distinguish and specify what portion of the time billed directly represents the handicap issues and what portion represents time spent on other matters solely raised to gain leverage. (G. 17). With respect to these latter matters, I conclude they are too remote from the dispute in question, and the relation of these other matters to the handicap dispute is too speculative to justify reimbursement. Accordingly, the Guards are not entitled to be reimbursed for the attorney fees for these collateral matters. Finally, because the time bill presented does not, with any specificity, distinguish between the time spent on the handicap dispute and the time spent upon other matters, I am constrained to disallow any award for attorney's fee based on this bill and statement of time.

The Guards are entitled to, and are awarded, the $500.00 paid to Yeatts (G. 22) for the preparation of plans for the wheelchair lift installation and walkways which the Association prevented the Guards from implementing.

B. Civil Penalty.

To vindicate the public interest, the Fair Housing Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 104.910(b)(3). HUD asks that a civil penalty of "at least" $5,000 be imposed in this case.

In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report on the Fair Housing Amendments Act of 1988 states:

> "The Committee intends these civil penalties are maximum, not minimum penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require." H.R. Rep. No. 711, 100th Cong., 2d Sess. 37, *reprinted in* 1988 U.S. Code Cong.& Admin. News 2173, 2198.

There is no evidence that the Association had previously been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against any Respondent is $10,000. 42 U.S.C. § 3612 (g)(3)(A) and 24 C.F.R. § 104.910(b)(3)(i)(A).

Evidence regarding a respondent's financial circumstances is peculiarly within their knowledge, so they have the burden of producing such evidence. If they fail to do so, a penalty may be imposed without consideration of their financial circumstances. *See HUD v. Jarrad* at 25,092; *Blackwell I* at 25,015. In the subject case the Association has failed to submit any evidence as to its financial circumstances or its inability to pay any civil penalty.

Over an extended period of time, the Association engaged in a course of conduct aimed at denying the Guards their rights under the Fair Housing Act. The Association and the Board were aware of the Fair Housing Act and the provisions for the handicapped, but nevertheless followed a course of dilatory conduct which frustrated the Guards and prevented them from exercising their rights protected by the Fair Housing Act.

As discussed above, Congress provided for the imposition of a civil penalty to deter conduct proscribed by the Act. A sufficient civil penalty must be assessed to ensure that the Association and others get the message that discrimination based on handicap status is unlawful under the Fair Housing Act.

Taking all of the foregoing into consideration a civil penalty of $3,500 against the Association is deemed appropriate and shall be imposed.

C. Injunctive and Other Equitable Relief.

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and to protect the public interest in fair housing. 42 U.S.C. § 3612(g)(3);

Blackwell II at 875. The purposes of injunctive relief include eliminating the effects of past discrimination, preventing future discrimination, and positioning aggrieved persons, as close as possible, to the situation they would have been in, but for the discrimination. *See Park View Heights Corp. v. City of Black Jack*. The injunctive and other remedies provided herein will serve these purposes.

It would be inequitable for the Association to make assessments against the Guards' unit to pay legal fees or other expenses incurred by the Association in the defense of this action or to pay for any of the damages or civil penalties to be paid by the Association as a result of this action. Accordingly, the Association will be ordered not to assess the Guards' unit to help pay legal fees, damage awards, or civil penalties to be paid by the Association as a result of this action.

HUD requests that the Association be ordered to issue a written public apology to Agnes Guard, to deliver it to her personally, and to post it in a conspicuous place on the Ocean Sands grounds. An apology is an inappropriate and ineffectual remedy. Rather, the Fair Housing Act protects certain rights and creates certain obligations. It does not legislate attitudes. More meaningful and appropriate than an apology is a recognition and admission by the Association that it and the individual unit owners are subject to, and must comply with, the Fair Housing Act. Accordingly, an apology by the Association shall not be ordered, but the Association shall be ordered to notify all unit owners, in writing, that the Association and the unit owners must comply with the Fair Housing Act, and it must advise all prospective buyers and renters that Ocean Sands is subject to the Fair Housing Act.

I also conclude, in order to permit HUD to ensure that the Association is complying with the Fair Housing Act, that it is appropriate that the Association be ordered to submit all minutes of the meetings of the Board and of the Association, itself, to HUD's Region IV Office of Fair Housing and Equal Opportunity for a period of five years. The Association shall also be ordered to submit to the same HUD office any requests for modifications or accommodations related to a person's handicap under the Fair Housing Act, or the Florida state fair housing law, and a description of any actions taken on such requests, to the extent such requests are not reflected in the minutes described above.

ORDER

1. Ocean Sands, Inc. is permanently enjoined from discriminating against any unit owner, any unit renter, any prospective unit purchaser, or any prospective unit renter with respect to housing because of handicap status. Prohibited actions include, but are not limited to failing to permit modifications or to make accommodations related to a person's handicap as required by 42 U.S.C. § 3604(f)(2) and (3)(A) and (B).

2. Ocean Sands, Inc. shall submit all minutes of meetings of its Board of Directors and of the Association to HUD's Region IV Office of Fair Housing and Equal Opportunity for a period of five years.

3. To the extent not included in the above described minutes, Ocean Sands, Inc. shall, for a five year period, submit to HUD's Region IV Office of Fair Housing and Equal Opportunity descriptions of any requests for modifications and accommodations related to residents' handicaps under the Fair Housing Act or the Florida state fair housing law, and of all actions taken.

4. Ocean Sands, Inc. shall notify, in writing, all unit owners that they are subject to the Fair Housing Act and that they must notify all prospective buyers and renters that the units are subject to the Fair Housing Act.

5. Within ten days of the date upon which this Order becomes final, Ocean Sands, Inc. shall pay Complainant Agnes Guard, in her individual capacity and as representative of the Estate of George Guard, as follows: $6,370.50 for out-of-pocket expenses, $5,000 for emotional injury to George Guard, and $8,500 for emotional injury to Agnes Guard.

7. Within ten days of the date upon which this Order becomes final Ocean Sands, Inc., shall pay a civil fine of $3,500 to the Secretary of HUD.

8. Ocean Sands, Inc. shall not assess the Guards' unit to pay legal fees, expenses, damage awards, or civil penalties incurred by Ocean Sands, Inc. as a result of this case.

9. Within 15 days of the date upon which this Order becomes final Ocean Sands, Inc., shall send written notice to HUD's Region IV Office of Fair Housing and Equal Opportunity, that sets forth the steps taken to comply with this Order.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. § 104.910 and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

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SAMUEL A. CHAITOVITZ
Administrative Law Judge